

IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE,
R.S.O. 1980 c. 340, as amended

AND IN THE MATTER OF COMPLAINTS MADE BY JACQUELINE
ALLAN AND ANGELA WILSON, BOTH OF OAKVILLE, ONTARIO, ALLEGING
DISCRIMINATION IN EMPLOYMENT BY RIVERSIDE LODGE, CHRYSALIS
RESTAURANT ENTERPRISES INC., AND MR. R. KNEIDER AND MR. T.
SOBCZAK AND MR. A. PARRA OF OAKVILLE, OMTARIO

BOARD OF INQUIRY

PROFESSOR IAN A. HUNTER

APPEARANCES: Ms. Leslie M. McIntosh Counsel to the Ontario
Human Rights Commission

Ms. M. Gabrielle Koller Counsel to the Respondents,
Riverside Lodge et al.



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DECISION

(1) INTRODUCTION

On September 1, 1983, I was appointed by the Honourable Russell Ramsay, Minister of Labour, as a Board of Inquiry under the Ontario Human Rights Code to hear and decide the complaints of Angela Wilson and Jacqueline Allan that they had been discriminated against in their employment by Riverside Lodge/Chrysalis Restaurant Enterprises Inc. because of their sex.

Hearings began in Toronto on September 28, 1983 and were continued in that location on December 12 and 13, January 17 and 18, February 8 and 29, March 20 and 21, and May 8 and 9, a total of 11 hearing days without argument (which I required to be submitted in writing). Written argument was received from counsel to the Ontario Human Rights Commission on October 12, 1984; from the respondents counsel on March 27, 1985.

Seventeen witnesses were heard. The transcript of evidence exceeds 1500 pages. As I believe the transcript confirms, both counsel relentlessly examined every conceivably relevant issue, indeed often straining my own conception of the bounds of relevance.

What is at issue is whether or not a dress designed for cocktail waitresses in one room of a restaurant, a dress

worn in that establishment by two part-time waitresses for a period of approximately two months, is or is not "sexist" and therefore a contravention of the Ontario Human Rights Code.

The Ontario Human Rights Code R.S.O. 1980, c. 340 (the "old" Code applicable to these complaints) clearly confers statutory discretion on the Ontario Human Rights Commission (in section 17(1)) to recommend "...whether or not a Board of Inquiry should be appointed..." and on the Minister of Labour to appoint or not to appoint a Board of Inquiry (section 17(1)). One must assume that at these steps in the statutory process consideration was given to the gravity of the issue and the desirability of such a public expenditure of time and money on its resolution. Once appointed a Board of Inquiry has no discretion but to "hear and decide" the complaint.

(2) THE EVIDENCE

(a) The Complainants

Chrysalis Restaurant Enterprise Inc. the Corporate respondent, operates a restaurant-tavern called Riverside Lodge which contains within it three licensed premises on three floors: the "Boathouse" on the top floor; "Greenstreets", a disco, on the middle floor; and "Sweeny's" a smaller bar with a country and western atmosphere on the ground floor.

Jacqueline Allan is a 27-year-old woman who is a teacher of retarded children at Oaklands Regional Centre in Oakville, Ontario. In January 1981 she obtained employment as a part-time waitress in the Greenstreets Disco at Riverside Lodge. She supplemented her teaching income by working, on average, two or three evenings a week. Her duties included bringing drinks to customers, cleaning tables, bringing ice, etc.; in other words, the ordinary duties of a cocktail waitress. Her salary was \$3.00 per hour plus tips which, on average, came to \$30-\$50 per night shift.

All of the waitresses in Greenstreets were women. The bartenders who prepared drinks for the waitresses to take to customers were sometimes male and sometimes female; there were also doormen and busboys who were male.

When Ms. Allan began employment at Greenstreets there was no required uniform. Instead cocktail waitresses chose their own style of dress. In the summer of 1981, management introduced a uniform for waitresses, a cotton khaki outfit consisting of wrap/around "genie" pants with slits in the legs and a strapless tube top. This uniform was designed by a female bartender, Karen Eatock. Ms. Allan testified that there was "some discussion" among the 20 or so cocktail waitresses about the uniform which she, and perhaps others, considered uncomfortable and "tacky." However, the uniform never became a serious issue, nor were there complaints,

about the uniform, either from individuals or from the group of waitresses, to the management.

The management representatives who testified, Mr. Richard Kneider (General Manager) and Andres Parra (Assistant Manager) stated that one or two waitresses did mention that the elastic tube top of the khaki uniform frayed or became too elastic, and the top would then sag down; Mr. Kneider instructed them to sew on over-the-shoulder straps which alleviated this problem.

The male employees at Greenstreets were required to wear a uniform: dark trousers and a white shirt or a T-shirt or polo shirt bearing the Riverside Restaurant logo. I accept the evidence of the General Manager, Mr. Kneider, on this point (Transcript vol. 10, p 43).

The khaki or summer uniform was abandoned at the end of the summer or early fall of 1981. For a short period of time, the waitresses resumed wearing their own clothes. Then, in early November, management introduced a new uniform which is the subject matter of the two complaints. This uniform was also designed and made for the staff by Karen Eatock, the female bartender, with the assistance of a woman named Rose, who was the girlfriend of the assistant manager, Andres Parra. In her evidence, Ms. Allan described this uniform

as consisting of "very flimsy material, sheer" with "slits exposed right up to your hips, to where your underwear were" (Transcript vol. 1, p 58). The colour was black with purple flashes.

Exhibits 8 and 9 purport to be six colour photographs of both complainants wearing the uniform in question. These pictures were taken by the complainants themselves on January 27, 1982 after both had ceased their employment at Riverside Lodge and had filed complaints with the Ontario Human Rights Commission. Exhibit 8 consists of three photographs; each photograph clearly reveals a slit in the lower part of the uniform and extending up the side of the leg. In each photograph, the complainant is posed so that the slit extends sufficiently up her leg to reveal her panties. Likewise, Exhibit 9 consists of three photographs, two of which again reveal the leg slit sufficiently open to reveal panties, and one photograph is of the top to the uniform tied around Ms. Wilson so as to reveal cleavage, a small portion of her bra, and part of her stomach.

From all of the evidence, I am satisfied that these photographs do not accurately reveal the uniform either as it was designed to be worn, nor as it was worn by the Riverside waitresses including the two complainants. These photographs are, in my opinion, a deliberate attempt to mislead someone, either the Human Rights Commission investigators or, conceivably,

this Board of Inquiry. They are an inaccurate description of how the uniform actually looked for several reasons: (a) because both complainants have tied or wrapped it so loosely as to reveal the maximum amount of flesh; (2) because, when actually worn, all or almost all of the waitresses pinned or hooked the leg slits to whatever level of exposure they felt comfortable with; (3) perhaps most important I find as a fact that waitresses were given specific instructions by management that the uniform was to be worn with a danskin and leotards or panty hose. Except for one photograph on Exhibit 8 the complainants have modelled the uniform with neither. I had the opportunity to have the uniform modelled for me by a former employee of Riverside Lodge, Nancy Kehoe, and I accept that that is how the uniform was actually worn, including by the complainants.

Exhibit 17 is a photograph of another former Riverside waitress, Vicki Plunkett, wearing the uniform. She is wearing a danskin beneath the uniform, and I am satisfied on all the evidence that this photograph accurately depicts how the waitresses working in Greenstreets actually looked. I must say that I do not find the uniform, as modelled for me by Ms. Kehoe or as photographed in Exhibit 17, particularly attractive; nor, however, do I consider it to be particularly revealing or risqué. Tacky it may be; excessively sexy it is not.

I realize that a photocopy of photographs will not be as clear as one might wish; nevertheless, I will append to this Decision xerox copies of Exhibits 8, 9, and 17 while retaining the actual exhibits with the original copy of my Decision.

It was difficult at times to determine whether Ms. Allan's objections to the uniform were to its "sexism" or its "aesthetics"; it is not clear, for example, whether she considered the uniform offensive because it was unduly revealing or offensive because it was ill-fitting.

"Q. Now, Ms, Allan, in your opinion having worn both the khaki uniform and the uniform you have just described, was the December 1981 uniform more or less revealing than the khaki uniform that you wore in the summer of 1981?

A. It was obviously more revealing, mainly because it didn't fit." (transcript, volume 1, p. 65)

Ms. Allan testified that she dealt with the "revealing" aspect of the uniform by pinning it at the hips and by wearing leotards or danskin underneath it. Thus, her actual appearance in the uniform would not be dissimilar to the picture of the waitress wearing the uniform in Exhibit 17, although it would be markedly dissimilar to the misleading photographs of both complainants in Exhibits 8 and 9.

Moreover (and I confess that I find this remarkable given the Commission's decision to proceed to a Board of Inquiry) it was clearly known to the Commission's investigating officer that waitresses did wear the uniform with a danskin and leotards underneath it and that, at minimum, management did not object to this. The investigating officer, Ms. Kaczmariski testified:

"Q. Now, in the course of your investigation, did you learn that the waitresses had had the option of wearing a danskin and tights under the uniform?

A. I learned that the waitresses did that and that management did not object to it."
(transcript, volume IV, page 30)

With such advance information, why would Commission counsel put in evidence, as exhibits, photographs which starkly misrepresent the way in which the uniform was actually worn and the way that it actually looked?

Ms. Allan testified that she frequently wore the uniform with a danskin or leotards underneath. She also pinned the top of the leg slits so that her legs would not be unduly revealed.

"A. Yes, the service bartender had hers pinned, because she kept getting caught up on the ...

Q. How far did she have it pinned down?

A. All the way down.

Q. Did you not try the same thing yourself?

A. Well, I wore black leotards, which was my way of adapting to the uniform. Therefore you couldn't see the flesh. As far as pinning them, I don't really think that that was my responsibility to keep pinning them down, which I did. I pinned them so you couldn't see my underwear, right? But if you pin something, you can't move in it, and there... they would rip, and everything else. You spent enough time adapting to put that uniform on, you know, let alone spending your time sewing it up." (transcript, volume I, page 131-2)

Ms. Allan used a number of adjectives in describing the uniform in question: "degrading, embarrassing, sexist, tasteless, inappropriate." Having reviewed her evidence in detail, I conclude that her objections were primarily aesthetic; she considered the uniform unattractive, ill-fitting, and inconsistent with the otherwise "classy" atmosphere of Greenstreets. The allegedly revealing or "sexist" objection was a convenient peg on which to hang her complaint, but, I find as a fact that it was, to a large extent, an afterthought after she had been laid off.

Ms. Allan testified that she and other waitresses complained to management about the new uniform, but to no avail. Ms. Allan said that she was told only that the new uniform was management policy and that all waitresses had to wear it. Consequently, she reluctantly wore it, as adapted, on several shifts. She estimated that the total number of times she wore the uniform was six to eight. (Transcript,

Volume I, page 81). She testified that when she wore the uniform she was subject to customers leering, making jokes about "pyjamas," and, on one occasion, a male customer putting his hand through the leg slits and on to her buttocks. She acknowledged that the doorman forcibly removed that customer from Greenstreets and that he was "banned" from the premises in future. She testified: " The Riverside was very good as far as staff complaints or protecting their staff and standing by their staff. They were very, very good like that. That's in the situation where the customer was removed and barred for life, that's something that they would stand by." (transcript, Volume I, page 88)

I observed Ms. Allan as she gave evidence. I beleive that she exaggerated customer reaction to the uniform. I beleive that she did so in order to paint a lurid picture of the effect that the uniform allegedly had on male patrons at the Riverside. I do not accept her evidence. I did not consider her to be a credible witness. Her evidence as to the customer reaction was opposed to the evidence of witnesses Kehoe, Richardson, Plunkett, Zanevra, Rumi and Faull, each of whose credibility I prefer to Ms. Allan.

After the alledged touching incident, Ms. Allen testified that several cocktail waitresses met and decided to refuse to wear the uniform. Those involved in this decision were

said to be Jan Lapointe (service bartender) and Angela Wilson (the other complainant), Ms. Allan herself, and a waitress named Virginia (or Ginny) Flemming. Ms. Allan acknowledged that other cocktail waitresses at Greenstreets did not share their commitment to abolishing the uniform and that the group of four "had become a closed group." Ms. Allan testified that one of their group, Jan Lapointe, objected to the uniform, but not strenuously enough to jeopardize her job by refusing to wear it. That left only three: the two complainants (Allan and Wilson) and Ginny Flemming.

Ginny Flemming was the first of the three not to wear the uniform and, according to Ms. Allan's testimony, Ginny was fired as a result. The circumstances of Ginny's dismissal are relevant insofar as they shed light on the reasons for the complainants' severance of employment. Ms. Allan had no direct knowledge of the reasons for Ginny's dismissal. From hearsay evidence, she concluded that Ginny was dismissed because she refused to wear the uniform.

The respondent's evidence was that Ginny Flemming was the only waitress ever to complain directly to management about the uniform. Both Mr. Kneider and Mr. Parra testified that Ginny Flemming was concerned that the uniform did not look good on her. Ms. Flemming is apparently a large woman and, although the company tried to make a uniform to fit her,

she still felt uncomfortable in a uniform which was obviously not designed for a woman of her build. When the complaint came to Mr. Kneider's attention, his evidence was that he allowed her to cease wearing the uniform. This evidence was supported not only by Mr. Parra (whose evidence, because of his close association with the corporate respondent, might be considered suspect) but also by several other of the respondent's witnesses, including witnesses who had worked with Virginia Flemming. Ms. Flemming's employment was subsequently terminated but for reasons unrelated to the uniform.

I prefer the respondent's evidence to that of Ms. Allan. I find as a fact that Virginia Flemming complained to management, that she was allowed to cease wearing the uniform because it did not suit her physique, and that her dismissal from employment was for reasons unrelated to the uniform in question.

Ms. Allan testified that the first shift that she worked after the agreement among the three waitresses to cease wearing the uniform was on a Thursday in January, 1982. She attended for work without the uniform. She informed a management representative (Nino) that she refused to wear the uniform because she considered it sexist. He made no reply and she completed her shift without incident. Two days later, Ms. Allan testified that she was phoned by Nino or Andres and asked to come into work on a Saturday night. She did so, again

wearing her own clothes. Again, there was no adverse comment from management. She completed her shift without incident. She testified that the following day (a Sunday) she received a telephone call from Tony Sobczak, an assistant manager, asking her if she had come to a decision about the uniform? Ms. Allan replied that she would continue to refuse to wear the uniform. Mr. Sobczak allegedly replied: "Well, you'll have to resign." Ms. Allan answered: "I will not resign; you'll have to fire me." Mr. Sobczak then said: "Okay, you're fired" and the telephone conversation ended. (transcript, Volume I, page 100).

Ms. Allan acknowledged that there was a staff meeting at Riverside the morning of the day she was fired and that she did not attend that meeting. She also acknowledged that this would have been an opportunity to raise the uniform issue in the presence of other staff. However, she chose not to attend the meeting because she said that she would have "stood alone" against the others and because "it wouldn't have made any difference anyway, because Richard Kneider was very straightforward and strict in his decisions."

Ms. Allan subsequently received a separation certificate from Riverside Restaurant indicating that she was "laid off because of a shortage of work."

Against this factual synopsis, the distinguishing aspects of Ms. Angela Wilson's complaint may be summarized as follows. Angela Wilson is a 28-year-old dental assistant-receptionist who lives in Oakville. She started employment as a cocktail waitress at Riverside Lodge on or about October 19, 1980 and worked, on average, three or four shifts per week. When she began working in Greenstreets, there was no uniform requirement.

Angela Wilson did not like the "khaki" or summer uniform; she found it to be "ill-fitting, uncomfortable and unattractive." However, she did not consider the uniform unduly revealing and she made no objection or complaint to management about it. "It wasn't a big issue...I didn't like it but I didn't complain." (transcript, Volume II, page 161) Ms. Wilson testified that in the fall of 1981 the khaki uniform apparently "faded out" and most waitresses resumed working in their own clothes.

Sometime in December, 1981, Karen Eatock, the bartender showed her a small piece of cloth fabric, approximately three inches by three inches, and mentioned that this was what the new uniform would be made of. Ms. Wilson was not particularly attracted to the fabric but she couldn't really tell what the uniform would be like from so small a sample. Shortly thereafter, Tony Sobczak, took her down to the basement to

try on a uniform. Ms. Wilson who is 4'11" in height found it difficult to find a uniform to fit. After trying on three or four, all of which were too big, she finally selected and took one, then tried to roll it up, wrap it, and pin it to an approximate fit. She wore the uniform on that shift, but found it embarrassing to do so because she considered it too revealing, particularly when she had nothing underneath except bra and panties. After one or two more shifts in which she tried to reduce exposure by pinning the uniform, Ms. Wilson bought a danskin and thereafter wore a danskin under the uniform. She did not, however, wear anything to cover her legs because she testified that she did not like wearing leotards. She continued to pin the leg slits on the uniform. Ms. Wilson testified that she was "kinda upset" by having to wear the uniform. After wearing the uniform for two or three weeks with the danskin underneath, Ms. Wilson decided to cease wearing it. One Friday night, she arrived for her shift in her own clothes. Tony Sobczak took her downstairs and read her a written warning from management. This warning, dated January 8, 1982 was filed as Exhibit 27 and reads as follows: "Miss Wilson is fully aware of a dress code for female sales staff during the evening in Greenstreets. It is an outfit that is mandatory, unless previously approved by a manager. This is not the first time that Miss Wilson has been told about coming to work without her uniform. This will not be tolerated by management." Mr. Sobczak asked her to sign the warning

but Ms. Wilson refused. He then sent her home and told her to call in before the next shift scheduled for the following day to advise management whether or not she intended to wear the uniform. Ms. Wilson left and went home. The following day (Saturday) she testified that she received a telephone call from Jackie Allan who told her that she (i.e., Jackie) had been called into work that night. Ms. Wilson testified that, at this point, she had made no decision as to whether to return to Greenstreets and wear the uniform or to quit. On receiving this information, Angela Wilson called the Riverside and spoke to Andres Parra. She asked him what was happening? He replied that they figured she was not coming back and so had called Jackie in. Ms. Wilson then replied: "Well, if that's the way it's going to be, then I am not coming back and I hung up." (transcript, Volume II, page 197) Later, Ms. Wilson received a termination certificate indicating that she "quit." She testified that she felt that she had no choice but to quit in view of management's insistence that she wear the uniform.

(b) The Commission's Witnesses

Three former Riverside employees testified for the Commission.

Shirley Darling described the uniform as "...exceedingly ugly...an appalling uniform" (Volume II; page 71). She wore leotards under the uniform and a flowing scarf around her neck. At times she also wore a full polyester exercise/workout outfit. There were no objections from management to the manner in which she wore the uniform. She also pinned the leg slits below the thighs. Despite these adaptations, she testified as to recurrent problems with customers caused by the uniform: specifically, negative or sexist comments; customers making passes; grabbing her buttocks; and the uniform getting caught up on chairs or other objects.

Ms. Darling testified that the other waitresses were "very upset" by the uniform (transcript, Volume II, page 82) and that it was the "unanimous attitude" of the waitresses that the uniform was "extremely ugly." (transcript, Volume II, page 105). This was clearly not so as will be seen when I review the evidence called by the respondent.

In mid or late December, Ms. Darling quit wearing the uniform and reverted to working in her own clothes. She worked three to five shifts in her own clothes and did not recall any specific complaint from management about that. At the end of December, she quit her job; although the uniform may have been a factor in her decision to quit, it was not the primary cause.

Ms. Darling was asked to compare the incidence of customer harassment when wearing the uniform and when dressed in ordinary clothes. She testified that it "probably" happened every shift that a customer would make some objectionable physical contact with her when she wore the uniform; she did not recall any such problem when she worked in her own clothes.

Linda Jean Crichton was a cocktail waitress at Riverside from April to December, 1981. She could only recall wearing the uniform once and she quit shortly after that. On the one shift she recalled, she testified that she experienced no particular problems and that customer reaction was "no different" to the new uniform than to the khaki outfit.

Commission counsel then sought and obtained permission to cross-examine Ms. Crichton on a prior inconsistent written statement. In this statement, in the witness's own writing and signed and dated February 4, 1982 she states: "Having been an employee of the Riverside Lodge for approximately eight months and having also been asked to (having worn) wear the subject uniforms, I can testify honestly to the fact that while outfitted in said uniforms I was continually acosted, harassed, made jest of, and was the object of many uncomplimentary remarks. I objected to such treatment but due to my financial situation I had no choice but to 'follow the rules and keep my employment.' I believe any waitress wearing the same uniform

would also be subject to such treatment (Re: Jackie Allan).

I was, however, fortunate enough to be hired elsewhere."

(Exhibit 16)

When confronted and cross-examined on this statement, the witness, at least partially, adopted it. She acknowledged that such problems did occur when she wore the uniform but she now considered, in retrospect, "it was not that bad."

I did not find Ms. Crichton a credible witness. I prefer the evidence of other witnesses.

Jeanette Laplant is a woman with 17 years experience as a cocktail waitress. At Riverside she was the service bartender in Greenstreets. She was at a staff meeting in the fall of 1981 when Richard Kneider informed the staff that there would be a winter uniform. Some of the women sought to discuss the uniform then but she testified that "Richard put a stop to it."

Ms. Laplant wore a danskin under the uniform and pinned the leg slits. She testified that the uniform was a nuisance because the open leg slits would allow the material to become caught up on objects. On the customer reaction provoked by the uniform, Ms. Laplant testified:

"Q. You said you pinned it for two reasons...one, so that it wouldn't get caught, and what was the other reason?

A. There are occasions when I had to work on the floor, if the girls got busy, or whatever, and I just found that it was a much more secure feeling, for me.

Q. What do you mean by that, you felt more secure?

A. Well, gentlemen, when they have a few drinks, have a tendency to lose their inhibitions a great deal, and they become more forward than normal.

Q. What does that have to do with this particular uniform?

A. I didn't want to cause trouble.

Q. What did you experience when you were wearing this uniform, if anything?

What were your experiences, apart from the catching on things that you have already described?

A. For me, mostly remarks.

Q. What kind of remarks?

A. Oh, there are many different kinds, all leading to the same end.

The Chairman: I am sorry, I didn't hear that.

The Witness: Many different types of remarks, but they all led to the same end...same sexist remarks.

Q. How often would that have occurred?

A. Oh, gosh! I never counted them. I don't know...

Q. Would it have happened...

A. ...several times an evening.

Q. Did you experience anything in addition to verbal remarks from customers?

A. Not me, no.

...

Q. And how did you feel about those remarks?
I mean, were they welcome to you, or were they
unwelcome?

A. No way...no.

Q. Sorry, I asked you a double-barrelled question
there, and you said 'No.' How did you feel
about the remarks?

A. How does one feel about remarks like that?
One usually will set them aside, or they will
straighten out that persons act, pretty quick.

Q. Were you offended, as well, by the remarks?

A. I wouldn't allow it.

Q. Now, as a result of the remarks and the experience
of getting the uniform caught on things, did
you make any complaints to management?

A. No official complaints, no." (transcript,
Volume III, page 144-145; 146-147)

In assessing the evidence of the three witnesses
called by the Commission in support of the complainants, I
keep in mind the following considerations:

(1) The evidence of Linda Jean Crichton is of little
or no assistance to me: not only did I find her not to be
a credible witness, but she wore the uniform in question on
only one occasion.

(2) Shirley Darling's evidence confirms that different
waitresses at the Riverside had strong and varying aesthetic
opinions on the uniform. Ms. Darling considered it ugly,
tasteless and sexist. However, against such evidence, I must
also consider the evidence of the witnesses Kehoe, Richardson,

Plunkett, Zanevra, Rumi, Faull and Eatock, all of whom found the uniform unobjectionable, and some of whom found it positively appealing. Although Ms. Darling attempted to leave the impression that the incidence of boorish behaviour by patrons increased when she wore the uniform, I did not find her evidence convincing on this point.

(3) The evidence of Jeannette Lapointe was essentially that the uniform was a nuisance, not that it was sexist. Also, on her evidence, the uniform was worn (a) with a danskin and (b) pinned in the leg slits, which would reduce the amount of body exposure.

(c) The Respondent's Evidence

Richard Kneider, general manager of the Riverside Lodge at the relevant time, and Andres Parra, assistant manager, both testified. From the outset of the hearing, the corporate respondent had admitted that there was a uniform requirement for waitresses in Greenstreets, that it was a compulsory requirement, and that Kneider and Parra were responsible for it. (See transcript, Volume I, page 14-15.)

I observed Mr. Kneider and Mr. Parra as they gave their evidence and I am satisfied that they were both frank, truthful witnesses. The relevant points emerging from their

evidence may be summarized as follows:

(1) Throughout the relevant period there was a dress code in effect for both patrons and staff at Riverside. Patrons were not allowed in Greenstreets who were sloppily dressed (for example, in T-shirts, or faded blue jeans or running shoes). For the male employees in Greenstreets (busboys and doorman) the uniform was dress slacks and a Riverside T-shirt; for waitresses the uniform changed from season to season but, in the late fall and early winter (1981-82) consisted of the uniform (Exhibit 17) to which the complainants object.

(2) Prior to the adoption of the uniform in question, there was a staff meeting at which the uniform was discussed. Mr. Kneider indicated to the staff that a winter uniform would be brought in on much the same lines as the summer outfit and that if there were any problems, "let us discuss it." (transcript, Volume X, page 79). Mr. Kneider could not recall whether Angela Wilson was at that meeting. Jacqueline Wilson was present and was upset at the fact that she would have to buy another outfit. (transcript, Volume X; page 40)

(3) Mr. Kneider testified that it was difficult, indeed impossible, to achieve unanimity on such aesthetic matters pertaining to a uniform as style, cut, fabric, and colour. Consequently management had to make a final decision

about a uniform that was consistent with the atmosphere at the Riverside. In the absence of aesthetic unanimity from a diverse and changing staff of waitresses, management attempted to obtain their opinion and input, but reserved the right to make the final decision itself.

(4) When the uniform was introduced, Karen Eatock (the bartender who selected the material and sewed the uniform) gave instructions that it should be worn with a danskin and leotards or panty hose. (transcript, Volume X: page 83)

(5) The uniform was generally worn with a danskin and either leotards or panty hose. Neither Mr. Kneider nor Mr. Parra could ever recall a waitress wearing the uniform with only a bra and panties underneath; that is, as depicted in the complainant's photographs: Exhibits 8 and 9. Indeed, Mr. Kneider testified that he would have sent any waitress home who appeared for work so attired.

"Q. If a waitress showed up for work dressed as Jackie and Angela are dressed in the photographs that form Exhibits 8 and 9, would you allow a waitress to work a shift looking that way?

A. Definitely not" (transcript, Volume X; page 62)

2

(6) Neither Angela Wilson nor Jacqueline Allan ever complained directly to Mr. Kneider about the uniforms. Mr. Kneider knew of their concern indirectly, because on a couple of occasions one of his managers had mentioned to him that the complainants were upset that the uniforms were "sleazy." He told his managers to tell the two complainants that if they were upset, they should come and talk to him personally about it. Neither ever did.

(7) The only complaint that Mr. Kneider ever received directly about the uniform came from Virginia Flemming. She complained that the uniform "did not become her" because of her large stature and she was allowed to wear her own clothes.

(8). Neither complainant ever requested a transfer to the two other rooms (Sweeney's or the Boathouse) within the Riverside, rooms in which the uniform was not worn.

(9) During the winter of 1982 the business at the Riverside fell off, apparently a common post-New Year's phenomenon in the hospitality industry. Mr. Kneider called a staff meeting on January 16, 1982 primarily to announce layoffs. He had originally intended to maintain waitresses whose sole source of income was the Riverside and to lay off those for whom the Riverside was a supplement to another primary source of income. Jacqueline Allan did not attend this meeting. "One

of the decisions that I had come to is basically that in regards to Jackie, if she did not care enough to be at the staff meeting when something like this was discussed that she would be one of the people laid off." (transcript, Volume X; page 51). Following the meeting, Jackie telephoned him and Mr. Kneider advised her that she had been laid off.

(10) On January 8, 1982 Angela Wilson was issued a warning notice for showing up for work without a uniform (Exhibit 27; quoted above). The following day (January 9, 1982) Angela Wilson was scheduled to work in the evening. Mr. Parra testified that he received a telephone call from Ms. Wilson: "I don't exactly remember what the conversation was, but I think it was to do with the fact of whether she had to wear the uniform or not. I had informed her that, yes, indeed she did have to wear the uniform. She said, in that case she would not be coming back." (transcript, Volume XI; page 29-30). Following this conversation Mr. Parra made an entry in the daily log book: "Angela called and said that she has decided to quit."

(d) The Respondent's Witnesses

(1) Nancy Kehoe

Nancy Kehoe was a waitress at Riverside Lodge from

December 1981 until November 1982. In the course of her employment she worked in all three licensed areas: Greenstreets, Sweeney's and the Boathouse. She not only wore the uniform in question at work but she wore and "modelled" the uniform at the Board of Inquiry. She wore the uniform with a danskin and stockings or tights, and she testified that that was how other waitresses wore it as well. The slits in the legsides of the uniforms were tacked down, the degree of tacking depending on the personal preference of each waitress. Ms. Kehoe considered the uniform tasteful and suitable to Greenstreets and stated: "I don't ever remember receiving anything other than compliments about it." (transcript, Volume IV; page 94). Ms. Kehoe's only complaint about the uniform was that it occasionally got caught up on a table. Otherwise, she received no negative comments or customer harassment related to the uniform.

(2) Janice Richardson

Janice Richardson worked part-time nights at Riverside. She wore the uniform with a tube top and pantyhose underneath. She wore the uniform on approximately ten shifts. When questioned about her appearance in the uniform, she replied: "It wouldn't have been my choice, but I didn't find it...I didn't object to wearing it." (transcript, Volume IV; page 163). She did not receive rude comments or harassment from patrons while wearing the uniform.

(3) Vicki Plunkett

Vicki Plunkett worked as a waitress in all three rooms at the Riverside Lodge from February 1982 to January 1983. She wore a danskin under the uniform and, in winter, tights or pantyhose. She also pinned the leg slits down to mid-thigh level. She testified that she was told by Andres Parra to wear a danskin with the uniform and the management did not interfere with the waitress's choice to pin the leg slits at whatever level she felt comfortable with. On the general appearance of the uniform on the waitresses and on customer reaction to it, her evidence was:

"Q. Did you ever observe the uniform being worn in such a manner as to expose underwear?

A. No.

Q. Did you ever observe the uniform being worn in such a manner as to expose a bra?

A. No.

Q. What was the attitude, so far as you could ascertain it, of patrons to the uniform?

A. A lot of people said it was very attractive. Girls occasionally asked, you know, who made them? Where could they get them made? And I remember giving Karen, the girl that made them, the girl's phone number and all that, so she could go and have one made for herself." (transcript, Volume V; page 17-18).

(4) Anna Zanevra

Anna Zanevra worked both full-time and part-time as a waitress at the Riverside from 1977 to 1982. Through these years, she had occasion to work in all three rooms and to observe a succession of prescribed uniforms come and go. She sometimes wore the uniform with a danskin, sometimes without, but with the top wrapped around and pinned and the leg slits pinned. Ms. Zanevra's opinion on the aesthetics of the uniform is revealed in the following questions and answers:

"Q. How, in your opinion, was the uniform received by the patrons at Greenstreets?

A. It varied. Some people really liked it, and other people thought it was ugly.

Q. Did anybody suggest that it was risque, to your recollection?

A. I don't remember.

Q. Did you feel comfortable in the uniform?

A. It didn't upset me at all.

Q. Is it something you, yourself, would have chosen to wear socially, or for leisure activity?

A. I don't think so.

Q. Why?

A. It's not to my taste. I could, perhaps, see wearing something like that on the beach, but it's just not to my taste.

Q. Did you consider the uniform risque or revealing?

A. No.

Q. Did wearing this uniform in anyway hamper your duties as a waitress?

A. No.

Q. Did you every complain to management about the uniform?

A. No.

Q. Did you ever complain to any of the waitresses about the uniform?

A. No." (transcript, Volume 5; page 166-168)

(5) Lil Rumi

Lil Rumi is a waitress with seven years experience who began work at the Riverside Lodge in March 1982 and continued to work, in both Greenstreets and the Boathouse, for approximately 11 months. She wore the uniform with a black or turquoise danskin underneath it. She also pinned the sides of the pants "just so it would lay flat, and it looked nice." When she was asked how she felt about the outfit, she replied: "I liked it. I felt covered, but I still felt good. I got a lot of compliments on it." (transcript, Volume VI; page 38). Ms. Rumi even wore the uniform outside the Riverside on at least one social occasion.

(6) Carol Faull

Carol Faull worked in Greenstreets as a waitress from March to May, 1982. Her evidence with respect to wearing

the uniform was as follows:

- "Q. What was the reaction of patrons, if any, to this outfit that you were wearing...the first outfit?
- A. 'Reaction', I can't remember anything.
- Q. The reaction of patrons. Did they say anything to you about your uniform, or about how you looked when you were wearing it?
- A. Once a fellow commented it looked like I was wearing pyjamas, but over a three month period, that wasn't a bother.
- Q. How did you feel yourself about the uniform?
- A. I liked it. It was comfortable.
- Q. I understand you were a full-time business woman or real estate agent at the time.
- A. M'hm.
- Q. Did you find that this...wearing this uniform at your part-time job in any way affected your image?
- A. No, not at all.
- Q. Did you worry about clients seeing you in this outfit?
- A. No, I didn't, although a lot of them did live in that area that worked with me.
- Q. Did any customer ever try to grab you or touch you when you were working at Greenstreets?
- A. No, they did not.
- Q. Did any customer ever make any rude comments to you?
- A. No, unless you would consider the pyjama comment rude, but I didn't.

Q. Did any customer ever make any perjorative comment to you?

A. No.

Q. Did any customer ever make a pass at you when you were wearing this outfit?

A. No." (transcript, Volume IX; page 13-14)

I note that Ms. Faull's employment at the Riverside commenced very near to the time that the uniform was phased out; while I found her to be a credible, honest witness and I accept her evidence that she wore the uniform and experienced no problems with it, I believe that her actual waitressing experience in the uniform was less extensive than several of the respondent's other witnesses.

(7) Karen Eatock

Karen Eatock has been a bartender at the Riverside since July 1979. She has ten years experience as a bartender or a waitress in various licensed establishments across Canada. She (together with a woman named Rose) chose the material for the "khaki" uniform and designed it after an outfit that one of the women had brought back from the United States and that was said to be "all the rage in Florida that year." Together, Karen and Rose sewed the uniforms which, according

to Ms. Eatock's evidence, were favourably received by both staff and patrons. In the fall of 1981, when the time came for a winter uniform, the "khaki" uniform served as the basic model for the uniform complained against. After a staff meeting at which the new uniform was discussed, Ms. Eatock set out to find a suitable new fabric and colour, particularly one which would not clash with the new carpeting which had been installed in Greenstreets. After the uniforms had been sewn, they were distributed to staff. Ms. Eatock's reaction was as follows:

"Q. Did you have any particular problems with this uniform?

A. No. I got compliments on it more than...I never...I never had any hassles from customers about it.

Q. Do you recall any waitress having complained to you about the uniform?

A. No.

Q. Do you recall if there were complaints about the uniform when it was first worn, the first few weeks?

A. The summer uniform or the winter uniform?

Q. No, the winter uniform. The first few weeks, were there complaints then?

A. No.

Q. Were there any complaints later on?

A. There were some grumblings about the...it was more the fact that the girls...I don't...didn't like them anymore, or didn't really want to be in a uniform.

Q. Do you recall who those grumblings were from?

A. Jackie and Angela complained about it. Those two primarily." (transcript, Volume VIII; page 45-46).

In cross-examination, Ms. Eatock was asked several questions by Commission counsel, questions which better than the thousands of others in the eleven volumes of transcripts, point up the essential non-justiciability of the "issue" which I am asked to decide. These questions suggest that Commission counsel at least appreciated that the nub of this case was aesthetic not legal, and the logic of the questions make one wonder in service of what public interest this matter was relentlessly pursued to its final conclusion:

"Q. All right. You didn't feel psychologically uncomfortable in this uniform at all?

A. In this uniform, no.

Q. Do you think that... you would agree with me that how someone feels in a particular item of clothing has a lot to do with their own particular view of what is, for example, decent or too revealing or not? I mean, that dictates how comfortable you feel.

A. Everybody has their own ideas about that." (transcript, Volume VIII, page 96)

Q. Is it your evidence that it was difficult to get the waitresses at Greenstreets to agree on what uniform there would be?

A. It's difficult to put 25 or 30 people in a room and try to get them to agree on anything, particularly an item of clothing. (transcript, Volume VIII, page 106)

The only Ontario human rights decision I regard as helpful precedent is Dean McCamus's decision in Ballantyne v. Molly N' Me Tavern (1983) 4 C.H.R.R. 1191. In that case a tavern which employed both waiters and waitresses attempted to require females to go "topless." The Board held that an imposition of such a requirement was a discriminatory term or condition of employment imposed on female staff because of their sex. I agree with the Board's reasoning and with the result. I agree because, in my opinion, the four requirements I have set out above were all met. In an obiter comment on the general issue of dress requirements, Dean McCamus wrote:

"What is objectionable under the Code, in my view, is the subjection of female employees engaging in work essentially similar to that of male employees to become, in effect, entertainers by virtue of a requirement to wear immodest dress. Such practices discriminate against female employees with respect to a term or condition of their employment."

In reaching my conclusions, I might also note that I have considered Doherty and Meehan v. Lodgers International Limited (1982) 3 C.H.H.R. 5654 and obiter discussion of the issue in Giouvanoudis v. Golden Fleece Restaurant and Tavern (Report of a Board of Inquiry under the Ontario Human Rights Code, December 21, 1983 at page 37-44). I have also read the discussion of this issue in Re Canada Safeway Ltd. and Steel (1984) 9 D.L.R. (4th) 330 at 350-56 and I note the obiter comment of Wright J. (at p 358)

"I do not receive the impression from the legislation that it is intended to stamp out bars where only waitresses in skimpy clothing serve customers."
(emphasis in original)

Applying the four conditions I have set out above to the facts of the instant case, I find (a) that males and females were not performing the same or similar work at Greenstreets; females were waitresses, males were doormen or busboys and, on occasion, bartenders; (b) the uniform requirement imposed by Riverside Lodge was imposed equally on its male and female employees; the uniforms were not identical but, as I have said earlier, section 4 of the Code does not require that; (c) from the evidence before me, I find as a fact that the uniform in question was consistent with "commonly accepted social norms" both within the restaurant/tavern trade and in the wider Ontario community. Indeed, on the evidence, I find that the uniform in question was neither unduly revealing nor risque; (d) Except in a very general way, the employer did not lead evidence on how the uniform in question related to its "business needs." Since the uniform in question was one of a series of uniforms adopted from time to time and was not maintained in use for a very lengthy period, the only conclusion I can logically draw on point (d) is that the wearing of this particular uniform was not essential, perhaps not even "related" to the business needs of Riverside Lodge.

If I direct my attention to Dean McCamus's obiter dictum in the Ballantyne case, I am satisfied, beyond any question, that the uniform was not so "immodest" or "sexist" as to transform waitresses into entertainers.

(5) DECISION

Jacqueline Allan was employed as a part-time waitress at Greenstreets in Riverside Lodge from January 1981 until January 1982. Her employment was terminated when she was laid off by Richard Kneider in January 1982. The primary reason for her layoff was her failure to attend a staff meeting held primarily to discuss impending layoffs; a subsidiary reason was her unhappiness about the uniform. At no time prior to her layoff did Jacqueline Allan complain directly to Richard Kneider although she had ample opportunity to do so. At no time did she ask to be transferred to either of the two other licensed rooms at Riverside Lodge where she would not have been required to wear the uniform.

Angela Wilson was employed part-time as a cocktail waitress from October 1980 until January 1982. She quit her employment on January 9, 1982 because she was unwilling to work in the uniform prescribed for waitresses at Greenstreets. Prior to her resignation she did not complain directly to Richard Kneider, the manager, nor did she request to be transferred to either of the two licensed rooms where the uniform was not worn.

The uniform in question was based on a summer "khaki" uniform which both complainants had worn without complaint.

Staff were advised that there would be a winter uniform similar to the summer uniform. Neither complainant objected to any alleged "sexism" in the proposed uniform. The uniform was designed and sewn by Karen Eatock. The only waitress who subsequently complained directly to Richard Kneider about the uniform was Virginia Flemming. Because of her figure, the uniform did not fit her and she felt uncomfortable in it. She was permitted not to wear the uniform.

The uniform in question drew a mixed reaction from the waitresses. Some considered it attractive, others ugly. I am not persuaded on the evidence that the complainants experienced harassment, verbal or physical, from patrons of Greenstreets while wearing the uniform; nor am I convinced that, even if they did, such harassment was related to the wearing of the uniform.

The complainants were not refused continued employment by the Riverside Lodge because of their sex, nor were they discriminated against with respect to any term or condition of their employment because of their sex. Accordingly, the complaints of Jacqueline Allan and Angela Wilson are dismissed.

Q. Would you say the uniform in question was designed by you to be a sexy uniform?

A. No.

Q. You don't think it was particularly sexy?

A. No, I don't.

Q. You don't think it was particularly revealing?

A. No.

Q. We have already agreed, I think, that people can have different standards of what revealing is and isn't. Isn't that right?

A. That is right.

Q. You have to say 'yes' or 'no' for the record.

A. Yes, certainly everybody has got their own ideas as to what is revealing and what is not.

Q. So, just because you don't think something is revealing doesn't mean that someone else might not honestly think something is too revealing?

A. I would say that is possible. But I think, in particular, if this outfit was in bad taste or in question, that I wouldn't have had comments... compliments and comments from male and female customers and females asking them to make it for them.

Q. Just because some other people have commented on it positively doesn't mean that other people might not find it uncomfortable or not react positively to it as well? Isn't that true?

A. It is possible." (transcript, Volume VIII, page 163-164).

(3) THE LAW

The complaints allege a violation of section 4(1)(b) and (g) of the Ontario Human Rights Code.

"4(1) No person shall"

(b) dismiss or refuse to employ or continue to employ any person;

(g) discriminate against any employee with regard to any term or condition of employment,

because of...sex...of such person or employee."

I am required to determine (a) were the complainants refused continued employment by Riverside Lodge because of their sex; or, (b) alternatively, were the complainants discriminated against with respect to any term or condition of their employment because of sex?

If the word "sex" is to be interpreted as meaning "gender" or either of the two primary definitions in one of the more recent comprehensive dictionaries of the English language (Collins Dictionary of the English Language, London 1979): (1) "The sum of the characteristics that distinguish organisms on the basis of their reproductive function; (2) either of the two categories, male or female, into which organisms are placed on this basis" then the answer to both questions is, self-evidently, no. Riverside Lodge did not refuse to

continue to employ Jacqueline Allan or Angela Wilson because they were female. Riverside Lodge hired the complainants as females and continued to hire females after the complainants ceased to be employed there. Riverside Lodge did not impose any different term or condition of employment on the complainants than were imposed on all staff in Greenstreets. The restaurant had a uniform requirement for employees who worked there. The complainants were given the same uniform as all other waitresses with the same instructions (i.e., to wear it with a danskin and panty hose) and the same options for adaptation (i.e., pinning or tacking the leg slits to the level one felt comfortable with). True, the uniform requirement was not identical for men and women: the male employees in Greenstreets were required to wear dress slacks and a Riverside T-shirt. But I do not believe that section 4(1) of the Ontario Human Rights Code, either by its plain words or by what I presume to have been its legislative intention, mandates unisex dress in the work place. In fact, I regard such a suggestion as transparent nonsense and will say no more of it.

But should the word "sex" be given a broader definition, encompassing more than gender, and embracing the situation in which an employer imposes a different uniform on his male and female employees and does so in order to highlight the differences between the sexes or to accentuate or exploit

the sexuality of one sex? The answer, in my opinion, is that in certain circumstances the word "sex" should be given a broader definition. Why? Because in such circumstances the employer is discriminating between his male and female employees and is doing so precisely because of that employee's sex. In other words, the employer is imposing more arduous employment requirements on one sex or the other, forcing one sex to become, in effect, sexual bait or inducement or entertainment, presumably in order to attract clientele. The employer is not imposing similar requirements on employees of the opposite sex.

In what circumstances then should the word "sex" be given a broader interpretation than gender. Although I am here in judicially uncharted waters (at least in Canada) the circumstances which I believe would warrant a broader interpretation are these: (1) that males and females perform the same or roughly similar work for the employer; (2) that the employer has imposed a requirement on employees of one sex which is clearly more burdensome or exploitative than the requirement imposed on employees of the other sex; (3) that the requirement in question lacks justification in "commonly" accepted social norms"; and (4) that the requirement is not proved (by the employer) to be reasonably related to the employer's needs. (I have drawn the terminology of the third and fourth conditions from Carroll v. Talman Federal Savings (1979) 604 F(2d) 1028, Seventh Circuit; cert. denied 100 S.Ct. 1316 (1980).

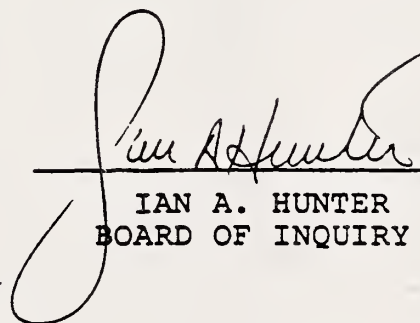
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The uniforms
worn in the
disco at the River
hodge Jan. 27/82.

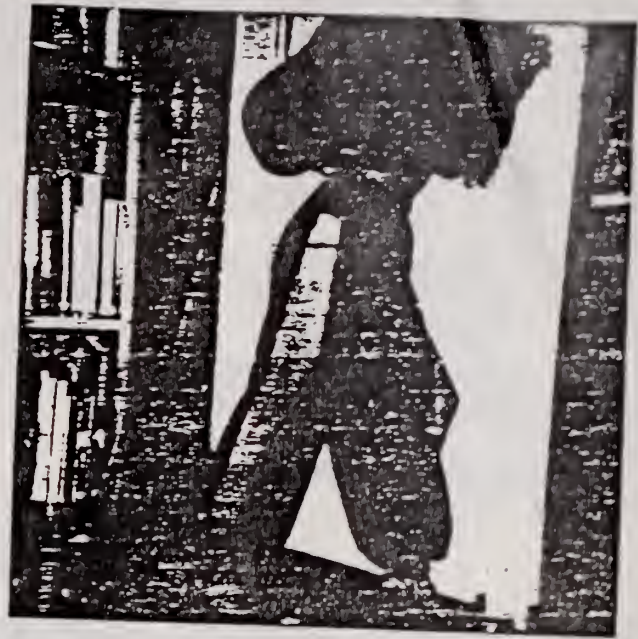


DATED at the City of London in the County of
Middlesex this 8th day of May, 1985.


IAN A. HUNTER
BOARD OF INQUIRY

17445

Exhibit I:
Uniform & Issue
in Complaints.



Jackie Allan

...g... Wils